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No. 482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS, AND JAMES CASTNER

Petitioners.

v.

JACOB PERKO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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I. RESPONDENT'S LEGAL ARGUMENTS

The bulk of Respondent's Brief in Opposition is devoted to an attempt to show that "The decision of the Supreme Court of Ohio is not in conflict with the Garmon case." (Br. in Opp. 7-14) The thrust of Respondent's argument, as we understand it, is that the National Labor Relations Act pre-empts state court jurisdiction only in cases involving disputes between unions and employers, which generally involve strikes or picketing. The principles enunciated in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), Respondent contends, apply only to such cases. These are the matters which, according to Respondent, are entrusted by the National Labor Relations Act to the exclusive jurisdiction of the National Labor Relations Board.

This case, Respondent contends, is akin to *International Ass'n of Machinists* v. *Gonzales,* 356 U. S. 617 (1958), which he characterizes as follows:

> "Gonzales . . . involved the highly individual problem of a single individual seeking work and the question of internal affairs, neither of which were matters of substantial regulative concern to the framers of the N.L.R.A."

The essential fallacy of this argument lies in its premise. The Act is not concerned solely with the relations between unions and employers. At least since the enactment of Taft-Hartley in 1947, the relations between unions and employees have been also subject to federal regulation. It is true that the Act does not concern itself with the rights of *union members as members.* It does not deal directly with exclusion from membership, expulsion from membership, or internal union discipline. It was for this reason that this Court reached the result that it did in *Gonzales,* which involved an action for wrongful expulsion from membership.

But when the claim upon which relief is sought is not union interference with membership rights but union interference with employment or employment opportunity, the Act as very much concerned. This is precisely what the Act deals with in Sections 8(b)(2) and 8(a)(3). As this Court stated in *Radio Officers* v. *NLRB,* 347 U. S. 17, 40 (1954), "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

The Act is also concerned, as we pointed out in our Petition, with the protection of the relationship between employers and their supervisors from union interference. Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B); *International*

Typographical Union, 123 N.L.R.B. 806 (1959), *enforced* 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided court*, 365 U. S. 705 (1961).

There is, of course, absolutely no basis for assuming that these aspects of the federal labor policy are less important than other aspects, or that they are any less subject to the exclusive jurisdiction of the National Labor Relations Board. Indeed, one of the earliest pre-emption cases in this Court was a state proceeding against an employer for discharging, and against a union for coercing the employer to discharge, an employee who had resigned his union membership. *Plankington Packing Co.* v. *Wisconsin Employment Relations Bd.*, 338 U. S. 953 (1950), *reversing* 255 Wis. 285, 38 N.W. 2d 688 (1949). The reasoning of *Garmon* and related decisions of this Court is therefore as applicable to the present case as to cases involving strikes, picketing, or similar conflict between unions and employers. The rule which this Court has clearly established is that the NLRB has exclusive primary jurisdiction over any matter which falls within the area regulated by the Act—*i.e.*, any matter which is "arguably" an unfair labor practice. There is simply no basis in any of this Court's opinions for the suggestion that this rule applies only to certain unfair labor practices and not to others. The only exceptions are cases involving violence, and cases involving union *membership* rights (as distinguished from *employment* rights) of individual employees. As we demonstrated in our petition, neither of these exceptions is applicable here.

II. RESPONDENT'S FACTUAL ARGUMENTS

We would like to deal briefly with two factual matters raised in Respondent's brief. First, Respondent states that, at the time the plaintiff was discharged, he was working as a "job superintendent." That is correct. However, if Respondent means to imply that the cause of action in this

case involved only the union's alleged interference with plaintiff's employment as a job superintendent, that is simply not the fact. The complaint alleged that the union had interfered with plaintiff's employment as both a "foreman" and a "superintendent." (R. 99) The testimony introduced by plaintiff was that, prior to his discharge, he had worked as both a foreman and a superintendent (Tr. 6-7), and that subsequently he had been unable to obtain employment in either capacity. (Tr. 78, 87, 102-3). The trial judge's instructions to the jury clearly stated that the theory of the action was that the union had interfered with plaintiff's employment both as a foreman and as a superintendent (Tr. 419, 442, 443-44). In its first opinion in this case, the Supreme Court of Ohio stated:

> "Plaintiff alleges . . . that defendants, without justification, conspired to deprive plaintiff of his right to continue to work as foreman for the William P. Pollock Company and as foreman for any other company in the geographic jurisdiction of Local No. 207, by suspending his foreman's rights, by demanding that the Pollock company discharge plaintiff as superintendent and foreman and by instituting a strike against the Pollock company for the sole purpose of coercing the company to discharge him; that in consequence thereof plaintiff was discharged; and that defendants have prevented plaintiff from procuring employment as a foreman." (Petition, App. A, p. 28)

Similarly, the Ohio Court of Appeals, in its opinion in this case, states that "the petition in this case alleges a conspiracy by the union and its members to keep plaintiff from working as a foreman or superintendent." (Petition, Appendix C, p. 36)

As we pointed out in our Petition, it is probable that both interference with plaintiff's employment as a superin-

tendent[1] and interference with his employment as a foreman[2] would constitute unfair labor practices. Nevertheless, since Respondent has accused us of "enlarging" the facts, we felt that it was important to clarify the matter.

Second, Respondent has accused us of making a "factual assumption" that the union sought plaintiff's discharge for violation of a union rule. The record shows, however, that plaintiff's theory—which the jury presumably sustained—was that the union sought his discharge because he had violated the union's rule regarding the instruction of boilermakers. Thus, the testimony of the plaintiff's employer, elicited by plaintiff's counsel, was that the union steward "said that Mr. Perko was educating the boilermakers in their particular work; so that they felt they weren't going to take orders from him any more." (Tr. 14) And it was the plaintiff who introduced the evidence of plaintiff's union

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[1] Respondent contends that "as a job superintendent, plaintiff was specifically exempt from the Act, and being exempt, he could not claim protection under the Act, even though he was a union member." This is simply an inaccurate statement of the law. The cases relied upon by Respondent are cases holding that a supervisor is not protected against discrimination by his *employer*. *NLRB* v. *Intercity Advertising Co.*, 190 F. 2d 420 (4th Cir. 1951), *cert. denied*, 342 U. S. 908 (1952); *L. A. Young Spring & Wire Corp.* v. *NLRB*, 163 F. 2d 905 (D. C. Cir. 1947), *cert. denied*, 333 U. S. 837 (1948). Those cases are correct. But what was involved here was interference by the *union*, which, as we pointed out in our Petition, has been held to be an unfair labor practice under Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B). *International Typographical Union* v. *NLRB*, 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided Court*, 365 U. S. 705 (1961).

[2] As we pointed out in our Petition (pp. 19-20) a "foreman" as the term is used in this case is probably an employee. Respondent does not seem to dispute this. We wish to point out, however, that this question is not one which this Court must decide to dispose of this case. As was clearly held in *Marine Engineers* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962), this is the type of question which must be left to the Board. For present purposes, it is sufficient that foremen are "arguably" employees, and it seems to be conceded that they are.

trial, and attempted to link it to plaintiff's subsequent discharge and inability to find employment. (Tr. 59-64).

It is true, of course, that the essence of the alleged tort was the union's interference with the plaintiff's employment, not the union trial or fine. Indeed, it is this fact, as we state in our Petition, which distinguishes this case from *Gonzales*. But in order to recover, plaintiff had to show not only that the union interfered with his employment, but that it did so "without justification." To establish that element, plaintiff attempted to prove that the union had injured the plaintiff because of his violation of the union rule. This is the plaintiff's "factual assumption," not ours. It was on the basis of a jury verdict sustaining this "factual assumption" that plaintiff recovered damages.

III. ANOTHER CASE, NOW PENDING ON PETITION FOR CERTIORARI, RAISES THE SAME QUESTION AS IS INVOLVED IN THIS CASE.

We wish to call to the Court's attention the fact that a petition for certiorari has recently been filed in a case entitled *Local 100, United Association* v. *Borden*, No. 541, which raises the same question as is raised here. In that case, the plaintiff sought damages against his union in the Texas courts for wrongful interference with his employment, alleging that the union refused to give him a job referral, and that as a result he was unable to obtain employment which would otherwise have been available to him. The trial court initially dismissed the suit holding, *inter alia*, that "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the Jurisdiction of the National Labor Relations Board . . ." (Pet. for Cert. No. 541, p. 5.) The Texas Court of Civil Appeals first affirmed the judgment, but then, on rehearing, reversed itself, citing this Court's decision in *Gonzales*, which had been rendered in the interim. *Borden* v. *United Association*, 316 S.W. 2d 458 (1958). The case then went back for trial, which re-

sulted in a judgment for the plaintiff. The pre-emption question was again raised on appeal, and again overruled by the Court of Civil Appeals, *Local 100, United Association v. Borden,* 355 S.W 2d 729. The Texas Supreme Court denied a writ of error.

The *Borden* case is yet another illustration of the fact which we pointed out in our Petition that many state courts are misreading and misapplying *Garmon* and *Gonzales.* The claim in *Borden,* as in the present case, was that the union had interfered with the plaintiff's employment. In both cases, the type of interference alleged would, if proved, have probably been an unfair labor practice under the Act. Yet in both cases state courts exercised jurisdiction on the ground that this Court's decision in *Gonzales* permitted it, thereby completely overlooking the fact that *Gonzales* involved not a claim for interference with employment but wrongful expulsion from membership.

The fact that there are two such cases pending in this Court at the same time demonstrates the importance of the question, and also provides this Court with a propitious opportunity for resolving it once and for all.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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